

SENATE No. 574

The Commonwealth of Massachusetts

PRESENTED BY:

Robert A. O'Leary

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act Relative to Malpractice Reform.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

Robert A. O'Leary

Cape and Islands

Susan C. Fargo

Third Middlesex

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO MALPRACTICE REFORM.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 233 of the general laws, as appearing in the 2006 official edition, is hereby amended by inserting, after section 79K, the following new section: -

Section 79L. (A) As used in this section the following terms shall have the following meanings unless the context clearly indicates otherwise:

“Health Care Provider”, means any of the following health care professionals licensed pursuant to chapter 112: a physician, podiatrist, physical therapist, occupational therapist, dentist, optometrist, nurse, nurse practitioner, chiropractor, psychologist, independent clinical social worker, speech-language pathologist, audiologist, marriage and family therapist and a mental health counselor. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

“Facility”, a hospital, clinic or nursing home licensed pursuant to chapter 111 or a home health agency. The term shall also include any corporation, professional corporation, partnership,

14 limited liability company, limited liability partnership, authority, or other entity comprised of
15 such facilities.

16 “Unanticipated outcome” means the outcome of a medical treatment or procedure,
17 whether or not resulting from an intentional act, that differs from an intended result of such
18 medical treatment or procedure.

19 (B) In any claim, complaint or civil action brought by or on behalf of a patient allegedly
20 experiencing an unanticipated outcome of medical care, any and all statements, affirmations,
21 gestures, activities or conduct expressing benevolence, regret, apology, sympathy,
22 commiseration, condolence, compassion, mistake, error, or a general sense of concern which are
23 made by a health care provider, facility or an employee or agent of a health care provider or
24 facility, to the patient, a relative of the patient, or a representative of the patient and which relate
25 to the unanticipated outcome shall be inadmissible as evidence in any judicial or administrative
26 proceeding and shall not constitute an admission of liability or an admission against interest.

27 **SECTION 2.** Chapter 231 of the general laws, as so appearing, is hereby amended, after
28 section 60K by adding the following new section:-

29 **Section 60L**

30 **Section 1.** Except as provided in this section a person shall not commence an action
31 against a provider of health care as defined in paragraph 7 of section 60 B of chapter 231 unless
32 the person has given the health care provider written notice under this section of not less than
33 182 days notice before the action is commenced.

Section 2. The notice of intent to file a claim required under section 1 shall be mailed to the last known professional business address or residential address of the health care provider who is the subject of the claim.

Section 3. The 182 day notice period in section 1 is shortened to 91 days if all of the following conditions exist:

(a) The claimant has previously filed the 182 day notice required in section 1 against another health care provider involved in the claim.

(b) The 182 day notice period has expired as to the health care providers described in section 1.

(c) The claimant has filed a complaint and commenced an action alleging medical malpractice against one or more of the health care providers described in subsection (a).

(d) The claimant did not identify and could not have reasonably have identified a health care provider to which notice must be sent under section 1 as a potential party to the action before filing the complaint.

Section 4. The notice given to a health care provider under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of care was breached by the health care provider.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of care.

(e) The manner in which it is alleged the breach of the standard of care was the proximate cause of the injury claimed in the notice.

(f) The names of all health care providers the claimant is notifying under this section in relation to the claim.

Section 5. 56 days after giving notice under this section, the claimant shall allow the health care provider receiving the notice access to all of the medical records related to the claim that are in the claimants control, and shall furnish release for any medical records related to the claim that are not in the claimants control, but of which the claimant has knowledge. This subsection does not restrict a health care provider receiving notice under this section from communicating with other health care providers and acquiring medical records as permitted in section 291f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

Within 154 days after receipt of notice under this section, the health care provider against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

(a) The factual basis for the defense to the claim.

(b) The standard of care that the health care provider claims to be applicable to the action and that the health care provider complied with that standard.

(c) The manner in which it is claimed by the health care provider that there was compliance with the applicable standard of care.

77 (d) The manner in which the health care provider contends that the alleged negligence of
78 the health care provider was not the proximate cause of the claimant's alleged injury
79 or alleged damage.

80 Section 6. If the claimant does not receive the written response required under Section 5
81 within the required 154 day time period, the claimant may commence an action alleging medical
82 malpractice upon the expiration of the 154 day period.

83 Section 7. If at any time during the applicable notice period under this section a health
84 care provider receiving notice under this section informs the claimant in writing that the health
85 care provider does not intend to settle the claim s within the applicable notice period, the
86 claimant may commence an action alleging medical malpractice against the health care provider,
87 so long as the claim is not barred by the statue of limitations.